



Comptroller General  
of the United States  
Washington, D.C. 20548

147847  
White

## Decision

**Matter of:** GIC Agricultural Group

**File:** B-249065

**Date:** October 21, 1992

Ronald K. Henry, Esq., Jeffrey A. Stonerock, Esq., and Sue Ann Dilts, Esq., Baker & Botts, for the protester, Robert A. Mangrum, Esq., and Joan G. Ochs, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for Chemonics International, an interested party, Robert Sonenthal, Esq., Agency for International Development, for the agency, Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Contention that offeror had an organizational conflict of interest and was ineligible for award because it provided material that led directly, predictably, and without delay to a statement of work is sustained where the agency--over the course of 8 months--used a contractor to write a draft project paper, adopted most of the analysis in its own project paper, and then used the two documents to prepare a statement of work for which the same contractor is now the successful awardee, and where the agency failed to take any action to mitigate the conflict.

### DECISION

GIC Agricultural Group (GIC) protests the award of a contract to Chemonics International under request for proposals (RFP) No. India 92-003, issued by the Agency for International Development (AID) for contractor services in support of the Agricultural Commercialization and Enterprise (ACE) project. GIC argues that Chemonics should have been barred from consideration for award based on its earlier involvement in preparing an ACE project paper report, and argues that AID misevaluated Chemonics's proposal and wrongly concluded that Chemonics, not GIC, offered the best value to the government.

We sustain the protest.

## BACKGROUND

AID's ACE Project is designed to encourage private entrepreneurs to establish agribusiness services and infrastructure in India. In addition to making loans and grants to businesses, the program is also intended to strengthen two key agribusiness support institutions in that area: the Industrial Credit and Investment Corporation of India (ICICI), a development finance institution; and the Mahratta Chamber of Commerce and Industry (MCCI), a trade association located in Bombay.

As now configured, the ACE project consists of four activities: (1) providing up to \$10 million in small loans to private agribusiness, administered by ICICI, to assist in developing food processing capabilities; (2) providing technical assistance and trade and investment tours for private firms to promote opportunities for processing and distributing Indian farm products; (3) supporting agribusiness lending by ICICI, including efforts to increase ICICI's expertise in making loans in the areas of food processing and food distribution; and (4) supporting agribusiness promotion by MCCI.

The ACE project, and the technical assistance contract at issue here, both have origins in prior AID dealings with Chemonics. On April 30, 1991, AID issued a contract to Chemonics to prepare a project paper report for the ACE project. Chemonics, 2 months later, submitted its project paper, called the "Project Paper Team Report," setting forth 174 pages of detailed analysis explaining the rationale, objectives, and suggested activities for the ACE project. This analysis included findings on the agribusiness sectors in the Indian economy most in need of assistance, appropriate project objectives, and recommendations on how to implement the ACE project.

On August 27, AID released its own project paper on the ACE project. While the AID project paper makes some changes to the tasks to be performed to implement the project, whole sections of the Chemonics report produced in June appear almost verbatim in the agency project report. In addition, although AID reduced the number of activities recommended by Chemonics from nine to four, parts of each of the four remaining activities are found in the original Chemonics approach. Further, AID adopted, with very few changes, the budget estimates outlined in the Chemonics project paper report, including the estimate of an appropriate cost for contractor-provided technical and managerial assistance.

On February 3, 1992--8 months after Chemonics submitted its project paper report, and 6 months after AID completed the agency project paper--AID issued RFP India 92-003,

soliciting offers for the technical assistance portion of the ACE program. The RFP implements the AID project paper released in August 1991. In this regard, the background, purpose, and goals of the project were set forth in the RFP almost verbatim from the Chemonics report. In addition, the RFP set forth the four technical activities as described in the agency project paper. As explained above, these activities, in large measure, were also contained in the original Chemonics project paper, along with other recommended activities not adopted by AID.<sup>1</sup>

The RFP contemplated award of a cost-plus-fixed-fee contract for the technical services needed to support the ACE project. The evaluation section of the solicitation advised that award would be made to the offeror whose proposal offered the best value to the government, considering both technical and cost factors. The solicitation also set forth the number of points available for each of several technical factors, and explained that out of 100 points available, 90 points were allocated to the technical criteria while 10 points were allocated to cost.

By the initial closing date, AID received five proposals, of which, two--the proposals submitted by GIC and Chemonics--were included in the competitive range. Between the technical proposals of Chemonics and GIC, AID concluded that there was almost no perceptible difference--Chemonics received a score of 66.5, while GIC received a score of 65.6. After one round of negotiations, AID requested best and final offers (BAFO) from both offerors.

Between the time that initial proposals were submitted and BAFOs received, GIC, by facsimile transmission dated March 31, requested a copy of AID's project paper from the source selection official. On April 9, AID's New Delhi office refused to provide a copy of the project paper to GIC, stating that agency policy prohibited providing such materials. The April 9 response suggested, however, that GIC might ask for the project paper with a Freedom of Information Act (FOIA) application to AID's Washington, D.C., Bureau for External Affairs, Office of Public Inquiries.

Upon receipt of BAFOs on May 22, the selection official chose not to ask the technical evaluation panel (TEP) to rescore the proposals, even though both offerors made changes to their technical proposals as a result of negotiations. The selection official did, however, ask for input

---

<sup>1</sup>The extent to which the RFP's statement of work is similar to the Chemonics project paper is described in greater detail below.

from the TEP chairwoman on the impact of revisions to the two proposals. Two memoranda in the record from the TEP chairwoman to the selection official show that she concluded that GIC had improved its proposal, but that Chemonics had not. Nonetheless, the selection official chose to award to Chemonics on the basis that while both GIC and Chemonics were very well qualified, Chemonics was proposing more people--i.e., a higher number of Indian subcontract personnel--to perform the required services than GIC. Since there was not a large difference between the proposed costs--GIC proposed \$5,539,723, Chemonics proposed \$5,746,503--the source selection official decided that Chemonics offered "more bang for the buck" and awarded the contract to Chemonics on June 9.<sup>2</sup>

#### ORGANIZATIONAL CONFLICT OF INTEREST

In its initial protest, GIC argues that Chemonics's role in preparing AID's project paper created an organizational conflict of interest providing Chemonics with an unfair competitive advantage over other offerors. According to GIC, AID acted improperly when it failed to either bar Chemonics from the competition or take steps to mitigate the competitive advantage obtained by virtue of Chemonics's previous role in preparing a project paper for the ACE program.

AID contends that GIC's conflict of interest argument is untimely because GIC failed to pursue its request for the project paper after AID initially refused to provide the document. In addition, AID argues that it was not required to disqualify Chemonics, or to release a copy of either project paper to GIC, because: (1) the agency significantly modified Chemonics's recommended approach in AID's project paper and in the statement of work; (2) the statement of work in the RFP provided more specificity than Chemonics's project paper; and (3) Chemonics did not gain a competitive advantage over other offerors as a result of having written the project paper.

---

<sup>2</sup>The materials provided by the selection official at the time of the selection decision do not show whether he agreed or disagreed with the input from the TEP chairwoman. In materials prepared in response to the protester's comments on the agency report, the selection official explains that he rejected the analysis of the TEP chairwoman and concluded that the relative technical merits of the two proposals remained unchanged from the initial evaluation.

## Timeliness

AID argues that GIC knew, or should have known, of the basis for its organizational conflict of interest claim at the time it requested a copy of the AID project paper. According to AID, since GIC's protest letter states that the request was made to "level the playing field," GIC must have been aware at the time it made the request that Chemonics had played a role in the creation of the ACE project, and that Chemonics was participating in the competition. Therefore, AID argues that GIC was required to either pursue the FOIA request, or challenge Chemonics's participation within 10 days of the time it learned AID would not provide the project report. See 4 C.F.R. § 21.2(a)(2) (1992).

Despite GIC's characterization of its request for the AID project paper in its protest letter--i.e., that the request was made to "level the playing field"--nothing about the written request suggests that GIC was aware that Chemonics had submitted a proposal in response to the RFP, that Chemonics's proposal had been included in the competitive range and was being considered for award, or that Chemonics had prepared the initial version of the project paper. Likewise, nothing in AID's written response refusing to provide the project paper alerted GIC to any of these facts, or to the fact that there was not one, but two versions of the project paper--the one prepared by Chemonics and the one prepared by AID. Since the record shows no reason for GIC to be aware of these facts, we fail to see why GIC should have been on notice in April that it needed to protest any consideration of Chemonics for award of the contract.<sup>1</sup> Accordingly, we consider GIC's protest timely filed.

---

<sup>1</sup>We also reject AID's contention that this case is governed by the result in Kimmins Thermal Corp., B-238646.3, Sept. 12, 1990, 90-2 CPD ¶ 198. In Kimmins we dismissed as untimely a disappointed offeror's challenge to an agency's decision to permit the awardee to compete where the awardee had initially been barred from the procurement because of an organizational conflict of interest. The awardee in that case had filed a protest with our Office against its exclusion, and had prevailed upon the agency to reverse its position. Since Kimmins was given an opportunity to participate in that protest but declined to do so, and since Kimmins was expressly notified of the agency's decision to reverse its position and permit the awardee to compete, we concluded that Kimmins could not wait until after award before filing a protest.

## Analysis

The Federal Acquisition Regulation (FAR) sets forth both general and specific instructions on organizational and consultant conflicts of interest in subpart 9.5. The FAR generally requires contracting officials to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, and 9.505. Specifically, the FAR requires that if a contractor:

(1) "prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services," or  
(2) "provides material leading directly, predictably, and without delay to such a work statement," the contractor may not supply the system or services except in certain limited situations. FAR § 9.505-2(b)(1). (Emphasis added.)

The FAR's restriction on permitting contractors to provide systems or services in cases where a contractor has assisted the government in defining its requirements is intended to:

(1) avoid the possibility of bias in situations where a contractor would be in a position to favor its own capabilities, see FAR § 9.505(a); or (2) avoid the possibility that the contractor, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. FAR § 9.505(b); see also Person-System Integration, Ltd., B-243927.4, June 30, 1992, 92-1 CPD ¶ 546. With respect to unfair advantage, the FAR states that such advantage exists when a contractor possesses source selection information relevant to the contract but not available to all offerors. FAR § 9.505(b)(2).

GIC's claim here is that Chemonics possessed an unfair competitive advantage, prohibited by the FAR, as a result of its special knowledge of the ACE program gained by preparing the project paper report. AID counters that regardless of Chemonics's role in drafting a project paper for the ACE project, the FAR prohibition does not apply to this situation because the project paper did not lead directly, predictably, and without delay to the statement of work. For the reasons set forth below, we agree with GIC.

The Chemonics version of the ACE project paper, formally titled the "Project Paper Team Report," was dated June 1991, and consisted of 174 pages of detailed analysis. Among other things, the Chemonics project paper explained the rationale, objectives, and suggested activities for the ACE project. The project paper analysis also included findings on the agribusiness sectors in the Indian economy most in need of--and most likely to respond to--assistance. In addition, the report included recommendations on how to



implement the ACE project, including: implementation schedules for the agency; cost estimates, including a detailed project budget; and plans for monitoring and evaluating the success of the project. Finally, the report included several technical annexes discussing such topics as: the fresh fruit and vegetable situation in India; technical analysis of food processing in India; suggested regions of India where the project would enjoy the greatest likelihood of success; financial and economic analyses of the project; and analyses on the social soundness of the effort, and the soundness of the two institutions (ICICI and MCCI) selected for support.

On August 27, 2 months later, AID completed its own project paper on the ACE program, modeled after the Chemonics project paper. Although AID claims that its project paper "substantially transformed" the Chemonics project paper, a comparison of the two documents does not support AID's claim. A page-by-page review shows that while AID changed the order of presentation in some areas, and changed some of the words--to significant effect in some cases--the vast majority of the analysis (perhaps more than 90 percent) has been copied from the Chemonics project paper into AID's project paper.

On February 3, 1992, AID issued the current RFP to procure technical assistance for the ACE project as described in its August 27, 1991, project paper. As explained above, the RFP implements the AID project paper released in August 1991, which implemented the Chemonics project paper. For example, we note that over half of the background section of the RFP can be located in the Chemonics project paper. Compare RFP § C.1 with Chemonics report at 8. In addition, even more of the RFP's explanation of the purpose of the ACE project appeared originally in the Chemonics document. Compare RFP § C.2 with Chemonics report at 6 and 9. Further, and more importantly, the RFP sets forth the four technical activities described in the agency project paper. These activities, in large measure, were also contained in the original Chemonics project paper recommending activities to implement the ACE program. Compare RFP §§ C.3 and C.6 with Chemonics report at 18 through 31.

In our view, AID's changes to the ACE project--as reflected in the agency's project paper and implementing statement of work--are mostly in the form of reducing the scope of the project by dropping certain activities. Otherwise, AID imposes few changes and does not refute the analysis or background work provided in the Chemonics project paper. For example, AID points out that the Chemonics project paper recommended that the ACE project cover the two Indian states of Maharashtra and Andhra Pradesh, while AID limited the project to Maharashtra only. Similarly, AID explains that

the Chemonics project paper recommended that the ACE project focus on "fresh and processed fruits and vegetables, flowers and foliage, and aquaculture products," and recommended special focus on grapes and mangoes. AID argues that the project is now different because its project paper eliminates any focus on aquaculture, and has only recommended a special focus on grapes. Likewise, AID explains that it did not adopt Chemonics's recommendation for reimbursable grants for commercialization projects. In each of these areas, AID's change to the original approach recommended by Chemonics is not so much one of shifting the emphasis recommended by Chemonics, as it is one of truncating the original recommendation.

We also find unpersuasive AID's arguments that the RFP's statement of work includes greater detail about the activities of the technical assistance contractor, and therefore, in AID's view, the materials provided by Chemonics did not lead directly or predictably to the RFP statement of work. Although AID is correct in its assertion that the discussions under each of the technical activities are more brief and general in the Chemonics project paper report than they are in the RFP statement of work, this is because the Chemonics project paper was an analysis of the entire ACE project. As such, the Chemonics project paper included analyses of the Indian agencies and markets involved, as well as financial and economic analyses of the program. The role of the technical assistance contractor was but one component in Chemonics's analysis of the overall project. We also note, however, that much of the more detailed material included under the headings of the four activities of the technical contractor in the RFP was simply included elsewhere in the Chemonics project paper as part of separate analyses on specific topics.

In short, our review of AID's arguments lead us to conclude that the agency can not reasonably claim that it has so modified the ACE program from its original interpretation in the Chemonics project paper that it has removed this situation from the coverage of the FAR admonition against conflicts of interest.<sup>4</sup>

---

<sup>4</sup>AID's relationship with Chemonics in this procurement is, in fact, very similar to one of the nine hypothetical situations set forth in the FAR to assist contracting officers in identifying organizational conflicts of interest. The example, found at FAR § 9.508(g), states:

"Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a  
(continued...)"



Finally, despite the many similarities between the two project papers and the RFP, the FAR imposes yet another requirement before an organizational conflict--and the resulting unfair competitive advantage that springs from the conflict--will be found. Specifically, FAR § 9.505-2(b)(1) requires that contractor-provided material lead "without delay" to a statement of work. When all three prongs are met--i.e., the material led directly, predictably, and without delay to a statement of work--the FAR imposes on contracting officers an unconditional duty to either: mitigate the conflict, or do not consider the conflicted contractor for award.

AID explains that the FAR admonition should not apply here because the "material passed through two intermediate

---

1 (...continued)

curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training."

3In this regard, a contracting officer can not assume that when the results of a competition are close, as they are here, there has been no prejudice because of the conflict. FAR subpart 9.5 has been very narrowly drawn. See Woodruff, Organizational Conflicts of Interest: Not What Its Said to Be, 16 Pub. Cont. L.J. 213 (1986). When the requirements of the FAR subpart have been met, and a conflict exists, the subpart assumes that an unfair competitive advantage exists. Here, where Chemonics prepared a budget for the ACE program, including estimates for the technical assistance component of the program, we find that this knowledge created the unfair advantage the FAR warns against. Having produced the outlines of the program, including the program's budget estimate, Chemonics had information at its disposal that was unavailable to other offerors, and that placed Chemonics in a unique position to structure a proposal that would meet the agency's requirements, while also meeting its budgetary constraints. See Holmes and Narver Servs., Inc./Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379, aff'd, Brown Assocs. Mgmt. Servs., Inc.--Recon., B-235906.3, Mar. 16, 1990, 90-1 CPD ¶ 299 (where former agency employee who had access to source selection information, including the agency's independent estimate of costs, left agency and went to work for contractor and prepared contractor's proposal, the likelihood of unfair competitive advantage warrants corrective action, despite the good faith behavior of all parties, to protect the integrity of the competitive process).

stages, lasting almost [8] months, during which the material was revised and elaborated." We disagree with AID's analysis. In our view, when an agency--in 8 months time--moves from receipt of a contractor's project paper, to completion of an agency version of the project paper, to release of an RFP, the agency has moved expeditiously from planning a project to implementing it. Given AID's swift action in implementing this project, we find that the FAR requirements apply squarely here--the materials provided by Chemonics led directly, predictably, and without delay to a statement of work for a technical assistance contractor. As a result, Chemonics had an organizational conflict of interest in this procurement.'

When contracting officers are faced with such conflicts, the FAR requires that they make a reasonable effort to avoid, neutralize, or mitigate the conflict. FAR § 9.504(a)(2). The FAR advises contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a conflict exists, and whether there is an appropriate way to resolve the conflict. FAR § 9.505. When a contracting officer takes steps to alleviate a conflict, our Office will not overturn the contracting officer's determination unless it is shown to be unreasonable. Ressler Assocs., Inc., supra.

Here, we find that the contracting officer should have recognized that Chemonics's involvement in this effort, its production of a model for the agency project paper (including relevant budget estimates), and its contact with individuals in India with whom the technical assistance contractor would be dealing, gave it unique advantages and insights in how to structure a proposal. In addition, although AID could have attempted to reduce the conflict prior to award by providing a copy of the Chemonics project paper to the other offerors, it failed to do so. Since we find that such a conflict existed, and that AID failed to take prompt steps to mitigate the conflict, we sustain the protest.

---

'We also disagree with AID's contention that this procurement fits an exception in the FAR provided for offerors who participate in development or design work. See FAR § 9.505-2(b)(1)(ii); Ressler Assocs., Inc., B-244110, Sept. 9, 1991, 91-2 CPD ¶ 230. As a consultant, Chemonics prepared an assessment of issues relating to an economic assistance effort. While its work in this area gave it a competitive advantage in the form of an insight into what services AID would require, its work is not analogous to a contractor who pushes the edges of technology in developing or designing new hardware or processes.

## EVALUATION ISSUES

GIC also argues that AID conducted an improper evaluation in several ways, but most importantly, in failing to recognize changes in the relative positions of GIC and Chemonics after submission of BAFOs. In this regard, we note that while the selection official appears to have continued to view the two proposals as technically equal--and yet selected the slightly more expensive Chemonics proposal as the one offering "more bang for the buck"--the two memoranda produced by the TEP chairwoman strongly suggest that the conclusion of the selection official may have been unreasonable. However, since we sustain GIC's claim that Chemonics was ineligible for award because of an unrelieved conflict of interest, and since we will recommend that the agency solicit a second round of BAFOs, we will not consider these issues.

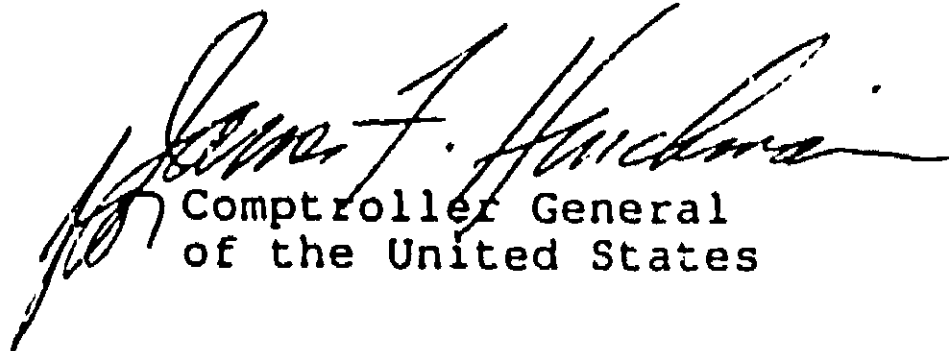
## RECOMMENDATION

For the reasons above, we find that AID failed to recognize and attempt to mitigate a conflict of interest making Chemonics ineligible for award. After this protest was filed, AID determined that it was in the best interest of the government to continue performance of the contract notwithstanding the fact that the protest was filed in time to be covered by the automatic stay provision of the Competition in Contracting Act of 1984 (CICA). When we sustain a protest under these circumstances, we are required by CICA, 31 U.S.C. § 3554(h)(2) (1988), to make our recommendation for corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract.

Although we find no evidence that AID acted in other than good faith, AID's failure to recognize this conflict--combined with its failure to take any steps to attempt to mitigate the conflict--has resulted in an improper procurement. Accordingly, we recommend that AID reopen the competition after attempting to mitigate the organizational conflict of interest enjoyed by Chemonics. At a minimum, AID should provide a copy of the Chemonics Project Paper Team Report to GIC. Afterwards, AID should request a second round of BAFOs, and should reevaluate those BAFOs in order to determine which offer presents the best value to the government, in accordance with the stated terms of the solicitation. In the event that GIC's proposal is found to represent the best value to the government, AID should

terminate the contract awarded to Chemonics, and award a contract to GIC. We also find that GIC is entitled to recover the costs it incurred in filing and pursuing the protest. See 4 C.F.R. § 21.6(d)(1).

The protest is sustained.



Comptroller General  
of the United States